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Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

HELEN C. POFF, as Executrix of the Last Will and Testament of JOHN B. WELSHANS, deceased,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT

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(BURLINGHAM, VEEDER, CLARK & HUPPER)

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Statement of the Case

This case presents the question whether recovery can be had under the Federal Employers' Liability Act (45 U. S. C., §51) for the benefit of a dependent cousin of the decedent, when the decedent left nearer non-dependent relatives, namely, two sisters and a nephew (son of a deceased sister) (R. 6).

The pertinent statutory words stating for whose benefit the Act gives a recovery in case of an employee's death are as follows:

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee * * *."

It will be seen that where the employee leaves no surviving spouse, children or parents—the situation in the case at bar,—the beneficiary under the Act is "the next of kin dependent upon such employee".

It is conceded that under the Statutes of Descent and Distribution of Pennsylvania, where decedent resided and where he was killed (R. 5), the sisters and nephew were the sole next of kin, in the sense that they would take under the Pennsylvania Statute of Distribution to the complete exclusion of the cousin, on whose sole behalf this action is brought (Petitioner's Brief, p. 6).

ARGUMENT

I. Decedent's cousin, for whose sole benefit this action is brought, does not fall within the category of those for whose benefit a right of recovery is given by the Federal Employers' Liability Act, since decedent's sisters and nephew were his "next of kin", to the exclusion of the cousin.

Recognizing that decedent's sisters and nephew constitute his "next of kin" under the Pennsylvania statutes, to the complete exclusion of the cousin, petitioner argues that the Act should be construed as giving a right of recovery to "the nearest surviving relative" who is dependent upon decedent, notwithstanding that there are nearer surviving relatives who qualify as next of kin under the Pennsylvania Statute of Distribution (Petitioner's Brief, p. 5).

Respondent believes that dependency merely conditions the right of the "next of kin" (once they are ascertained), but plays no part in defining who are "next of kin", or who can recover (if they can establish dependency).

Respondent contends that the words "next of kin" should be given their usual "legal" meaning, namely, those entitled to take under the state law. Such is the construction that this Court has put upon the words "next of kin" in the Federal Employers' Liability Act. In *Seaboard Air Line* v. *Kenney*, 240 U. S. 489, this Court said:

> "Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law" (493-4).

The same construction has been placed upon the words where used in other Federal statutes. In *Blagge* v. *Balch*, 162 U. S. 439, which involved the construction of an Act of Congress granting awards for French spoliation claims to "next of kin" of the original sufferers, this Court said:

> "And we are of the opinion that Congress * * * intended next of kin according to the statutes of distribution of the respective states of the domicile of the original sufferers" (464).

In accord, *Buchanan* v. *Patterson*, 190 U. S. 353, 362.

Besides stating how the "next of kin" are to be ascertained, the *Kenney* case (*supra*) states squarely that it is "the next of kin to whom a right of recovery is granted". There is no suggestion that any dependent relative who is not "next of kin", could ever have the benefit of the Act.

Following the *Kenney* case, the New York Court of Appeals held in *Hiser* v. *Davis*, 234 N. Y. 300, 305, that

the meaning of the word "children"—whether it includes illegitimates—likewise depends upon the state law.

The beneficiaries under the Federal Employers' Liability Act are the spouse and certain relatives, not collectively, but in the alternative, in a fixed order of priority. *C. B. & Q. R. R. Co.* v. *Wells-Dickey Trust Co., Adm.*, 275 U. S. 161, 163. The order of priority is determined by relationship, not by dependency.

In large part, Congress established the order of priority. In the first class, Congress placed "the surviving widow or husband and children". It is only in case no one of that class survives that recovery can be had for the benefit of the second class, namely, the "employee's parents". Only if no one survives from the first or second class can there be a recovery for the benefit of the third class, "the next of kin dependent upon such employee".

Congress, however, did not define who are "next of kin", with the result that, as this Court held in the *Kenney* case (*supra*), that question is to be determined by the appropriate state law.

Neither the words of the Act nor the decisions of this Court interpreting the Act, in any way support the view that the inability of persons of a prior class to establish pecuniary damages operates to pass the right to a succeeding class. The language of the Act makes nonsurvivorship of persons in the first class a condition to the right passing to the second class; likewise, the nonsurvivorship of persons in the second class, a condition to the right passing to the third class.

Consonant therewith, this Court held that the fact that a widow survived, although she had deserted decedent and apparently could not show dependency or expectation, pre-

cluded a recovery for the benefit of decedent's dependent mother. *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367. In *Lindgren* v. *U. S.*, 281 U. S. 38, recovery was denied where the next of kin, a nephew and niece, were not dependent. There was no suggestion that their non-dependency would serve to qualify a more distant relative who might be dependent.

Petitioner argues that because the next of kin must establish dependency and the widow or parent must establish some expectation, this establishes that the purpose of the Act is to provide for *dependent relatives* and that eligibility for recovery is based upon "dependence" and not "any State statute of descent and distribution" (Petitioner's Brief, p. 6). Petitioner argues that the Act should be construed as "disregarding any nearer relative who does not so [i. e., by being dependent] qualify" (Petitioner's Brief, p. 7). In other words, petitioner would treat a non-dependent relative as being a non-surviving relative, to the end that the right of recovery should pass down the line of relationship until it reaches some relative who is dependent.

To this argument, the Circuit Court of Appeals said:

> "The plaintiff relies chiefly upon the well-settled law that recovery by any of the persons named in the statute is limited to the pecuniary loss suffered. *Michigan Central R. Co,* v. *Vreeland*, 227 U. S. 59; *Gulf, Colorado and Santa Fe R. Co.* v. *McGinnis*, 228 U. S. 173. However, the converse by no means follows: i. e. that all who suffer pecuniary loss by the death may recover" (R. 25).

The Circuit Court of Appeals then cited various decisions of this Court inconsistent with the construction of the Act for which petitioner contends (R. 26).

Had Congress intended that in the absence of spouse, child and parent the recovery should be for the benefit of dependent relatives not necessarily "next of kin", Congress would have so provided, as it did in the later Death on the High Seas Act, 46 U. S. C. A. §761. Instead of the words "next of kin", that statute uses the words "dependent relative". Similar words have been used in other death statutes, e. g., those involved in *Cole* v. *Mayne*, 122 Fed. 836, and *Baldwin* v. *Powell*, 294 N. Y. 130, 133. Congress in the Act involved here, however, used the words "next of kin", not the word "relative".

The state court decisions cited by petitioner may be readily distinguished. In *Missouri, K. & T. Ry. Co.* v. *Canada*, 130 Okla. 171, 265 Pac. 1045—the authority cited by 25 *C. J. Secundum*, p. 1112—the decision turned on the fact that married adults were held not to be "children" within the meaning of the Oklahoma statute and, accordingly, the right of action vested in the next of kin, which was held to include a husband under Oklahoma law. In *Pries* v. *Ashland*, 143 Wis. 606, 128 N. W. 281, alien parents were held not to be within the intendment of the statute, hence the right vested in a sister, since there was no one belonging to a prior class.

Lytle v. *Southern Ry. Co.*, 152 S. C. 161, 171 S. C. 221, cert. den. 290 U. S. 645, turned on the fact that decedent's wife had deserted him without cause and was living in adultery with someone else: the Court considered the woman's status comparable to that of a divorced wife and that she was not a "widow" within the meaning of the statute. *Indianapolis, etc. Co.* v. *Thompson*, 81 Ind. App. 498, 134 N. E. 514, was similar, except that the deserting party was the husband.

Petitioner relies on a statement in 2 *Roberts, Federal Liability of Carriers* (2nd Ed.), Sec. 882, pp. 1729-31. Roberts cites as support for his view the *Harris* case (*supra*), 247 U. S. 367. But that decision is contrary to Roberts' statement, since this Court held that the fact that a widow survived, although she had deserted her husband and could apparently not show dependency or expectation, precluded a recovery on behalf of a mother who had sustained pecuniary loss.

In *Notti* v. *Great Northern Ry. Co.*, 110 Mont. 464, 104 Pac. (2d) 7, relied upon by petitioner, the deceased left two adult sons and a dependent mother. Suit was by the administrator and the decision was on demurrer to the complaint. There being no spouse, the sons were in the first class, so that, as against demurrer, the administrator's suit was held to be maintainable, even though only nominal damages might be provable.

The dictum that recovery might be had for the mother was based on the passage from *Roberts, Federal Liability of Carriers*, which, as pointed out above, is unsupported by authority, and is contrary to this Court's decision in the *Harris* case (*supra*), 247 U. S. 367.

Almost the precise question involved here was decided adversely to petitioner's contention in *Kelley's* case, 222 Mass. 538. The pertinent statutory words there were:

> "next of kin who were wholly or partly dependent upon the earnings of the employee for support."

The fact that deceased left a non-dependent father was held to bar a dependent brother, who would have recovered had the father not survived.

The correct rule was well stated in *In re Stone*, 173 N. C. 208 (writ dismissed, 245 U. S. 638), where the Court said:

> "The Federal statute [the Employers' Liability Act], therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provisions 'dependent upon such employee' * * * then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery."

Who are the third or last class? Clearly those recognized by the State statute as being the next of kin of the decedent at the time of his death—in the present case the sisters and nephew. Had such next of kin not survived decedent, others—in this case the cousin—would have been the next of kin. But that *possibility* does not result in the inclusion of the cousin in the third class. Since none of the members of the third class was dependent, then, as the *Stone* case holds, "there can be no recovery".

II. The legislative history of the Act supports the Circuit Court of Appeals' construction: it discloses no intention that where no spouse, child or parent survives, relationship, no matter how remote, if coupled with dependency, will support a recovery.

As first introduced in the House, the 1906 bill (the forerunner of the present Act) provided that recovery should be for the benefit of the "heirs at law" of the deceased (Petitioner's Brief, p. 14). When the House Committee substituted as beneficiaries:

"his widow or children, if any, if none, then for his next of kin dependent upon him".

Congress made clear its intention that if a widow or children survived, the recovery should be entirely for their benefit regardless of the status of the widow or children under the state statutes of distribution. It was well known that under most statutes of distribution, a spouse shares in the other spouse's estate only to a limited extent. A brother might receive more than the widow.

Congress also dealt specifically in favor of parents, if no widow or child survived (Petitioner's Brief, p. 14, n. 5).

The changes made in the 1906 bill, carried over in substance into the 1908 Act, also made it clear that if no widow, children or parents survived, the right passed to the next of kin, but only if they were dependent on the deceased. The proposed amendment (Petitioner's Brief, p. 14) that the recovery should be distributed as "unbequeathed assets" would have had the same disadvantage as the use of the words "heirs at law"—i.e., from the standpoint of giving the widow and children full priority; also the additional disadvantage of making the recovery available to creditors.

It is apparent that what principally concerned Congress was that the recovery should go exclusively to the spouse and children, if any of that class survived; that if none survived, then the recovery should go exclusively to the employee's parents. If no one belonging to these special relationships should survive—relationships where the law ordinarily imposes an obligation of support—then the next of kin could recover if they were in fact dependent. There is no suggestion that the right of recovery should ever go beyond the class of "next of kin".

Petitioner concedes in substance that Congress was motivated by the foregoing considerations (Brief, p. 16), but

petitioner contends that Congress also intended to avoid the effect of state statutes of descent and distribution, in the determination of who might recover in the absence of any survivors of the first two classes. There is nothing in the debates in Congress which supports this view. The quotations from Senators Sutherland and others (Respondent's Brief, p. 15, n. 6) show that their concern related to the widow, children and parents, not to persons of more distant relationship. And, as shown in Point I, petitioner's contention is contrary to the decisions of this Court.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Ray Rood Allen,
Counsel for Respondent.

(Burlingham, Veeder, Clark & Hupper)

New York, N. Y.,
January, 1946.

SUPREME COURT OF THE UNITED STATES.

No. 484.—October Term, 1945.

Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, Petitioner, *vs.* The Pennsylvania Railroad Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 25, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Congress provided in the Federal Employers' Liability Act (35 Stat. 65, 45 U. S. C. § 51) that the carrier's liability in case of the death of an employee runs

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."

The deceased, residing in Pennsylvania, was a railroad engineer employed by respondent and was killed while engaged in its service in interstate commerce. Respondent's negligence was conceded. The deceased left no widow, children, or parents. His nearest surviving relatives were two sisters and a nephew, none of whom was in any way financially dependent on him. But petitioner, who was his cousin, was a member of his household and wholly dependent on him for support. The District Court rendered judgment for petitioner. 57 F. Supp. 625. The Circuit Court of Appeals reversed, holding that petitioner was not entitled to recover since there were nearer relatives, though not dependent ones, who survived the deceased. 150 F. 2d 902. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question.

We assume without deciding that the Circuit Court of Appeals correctly concluded that members of the second or third class, irrespective of their need, are not entitled to recover if there survives a member of the prior class. Cf. *Notti* v. *Great Northern Ry. Co.*, 110 Mont. 464. The liability is not "to the several classes collectively" but in the alternative to one of the three classes. *Chicago, B. & Q. R. Co.* v. *Wells Dickey Trust Co.*, 275 U. S. 161,

163. Thus to an extent, at least, the order of priority is determined by relationship, not by dependency. See *New Orleans & N. R. Co.* v. *Harris*, 247 U. S. 367. Cf. *Lytle* v. *Southern Ry.*, 152 So. Car. 161. But the Circuit Court of Appeals went further and applied that principle to determine which members of the third class (next of kin) were entitled to recover. It said that since parents or grandchildren, dependent on the deceased, are left without remedy if a widow or child survives, Congress could not have meant to recognize remote members of the deceased's other kin, similarly situated. It read "next of kin dependent upon such employee" to mean "next of kin, *if* dependent upon such employee". Since the two sisters and nephew were the "next of kin" who would take to the exclusion of petitioner under Pennsylvania's law of descent and distribution[1] if the deceased died intestate, petitioner was barred here.

We read the statute differently.

It is clear that "next of kin" is determined by state law. *Seaboard Air Line Ry.* v. *Kenney*, 240 U. S. 489. State law governs whether it is necessary to determine if one relative is closer than another, or if a claimant falls within or without the class. But under this Act, unlike the state statutes of descent and distribution, a member of the third class must be not only next of kin but also dependent on the deceased in order to recover. The emphasis on dependency suggests that Congress granted the right of recovery to such next of kin as were dependent on the deceased. And that interpretation seems to us to be more in harmony with the Act than the construction adopted by the Circuit Court of Appeals.

We are not warranted in treating as an antecedent class the nearer next of kin who are not dependent. That would be to rewrite the statute. Congress has created three classes, not four or more. Yet to hold that the existence of nearer next of kin who are not dependent bars recovery by more remote next of kin who are dependent is to assume that the former constitute a preferred class. Congress, however, placed all next of kin in one class. To use dependency as the selective factor in determining which members of a particular class may recover is no innovation under this Act. For the Court held in *Gulf, C. & S. F. Ry. Co.* v. *McGinnis*, 228 U. S. 173, that in a suit brought by a widow as

[1] See 20 Purdon's Pa. Stats. Ann. §§ 62, 63, 66, 67.

administratrix for the benefit of herself and four children, a judgment in favor of an adult child who was married and resided with and was maintained by her husband would not be sustained in absence of a showing of pecuniary loss. Moreover, when Congress made the widow preferred over the parents and both the widow and parents preferred over the next of kin, it barred the deferred classes from recovering by creating a preferred class which could recover. Yet if respondent's theory is adopted, the nearer next of kin who are not dependent are treated as a preferred class not for the purpose of allowing them to recover but to defeat a recovery by all next of kin.[2] It may be true, as was the case in *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co., supra*, that the cause of action may be lost to the preferred class and to the deferred class as well. But that result, though possible, flows not from the nature of the preference but from such circumstances as the failure promptly to pursue the claim. Yet it would be a radical departure from the statutory scheme to do within the third class what Congress has not done between the classes and defeat all recovery by holding that the cause of action vested in one who could not under any circumstances sue. Under this Act deferment of a class is based on the existence of members of a preferred class to whom Congress has granted the right of recovery. We find no compulsion in the policy or language of the Act to adopt a more stringent interpretation when we come to determining what members of the third class may sue.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[2]It is clear that the two sisters and the nephew, the nearest surviving relatives, could not recover. Lindgren v. United States, 281 U. S. 38.

Mr. Justice FRANKFURTER dissenting, with whom Mr. Justice BURTON concurs.

Congress might well have allowed recovery as a matter of course to any near relative of a railroad employee whose death was due to a carrier's negligence. Congress chose not to do so. Congress merely gave a right of action "to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death." *Mich.*

Cent. R. R. v. *Vreeland*, 227 U. S. 59, 68; and see *Gulf, Colorado &c. Ry Co.* v. *McGinnis*, 228 U. S. 173, 175; *Garrett* v. *Louisville & Nashville R. R.*, 235 U. S. 308, 313. Congress might have extended the benefits of its legislation to any dependent relative by using a colloquial description such as "the nearest dependent surviving relative." It chose not to do that. On the contrary, it used the phrase "next of kin," a term of precise meaning in the law. In sum, Congress carefully limited the relatives eligible for compensation for an employee's death and strictly designated the basis of eligibility.[1]

What Congress did was thus analyzed by the court below:

> "Congress, which was willing to leave unremedied loss suffered by parents, or grandchildren, who might be totally dependent upon the deceased, could not have meant to recognize remote members of the deceased's other kin, similarly situated. The plaintiff's interpretation does not fulfill any rational purpose; it merely introduces an exception at the precise place where an exception is least to be desired or expected; it mutilates the statute, as much in its purpose as in its language. As in the case of the first two preferred classes, 'next of kin' is defined by its hereditary, not by its pecuniary, relation to the deceased; it means the next of kin as the law has always meant it; and dependency is only a selective factor, a condition upon recovery by any members of that class, as it is among members of the first two classes. The case is not therefore one in which Congress has failed to express its obvious purpose, and in which courts are free to supply the necessary omission: it is a case where—whatever that purpose—it certainly did not include what the plaintiff asserts." *Poff* v. *Pennsylvania R. R.*, 150 F. (2d) 902, 905.

I do not find a persuasive answer to this analysis and am therefore of opinion that the judgment below should be affirmed.

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1 "That every common carrier by railroad [in interstate and foreign commerce] shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death. . . ." 35 Stat. 65, 53 Stat. 1404, 45 U. S. C. § 51.